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Smith (R. R.)

IMPARTIAL STATEMENT

OF THE

CONTROVERSY,

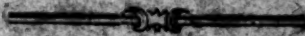
RESPECTING THE DECISION OF THE LATE

COMMITTEE OF CANVASSERS.

CONTAINING,

THE OPINIONS OF EDMUND RANDOLPH, ESQ,

ATTORNEY GENERAL OF THE UNITED STATES, AND SEVERAL OTHER
EMINENT LAW CHARACTERS.



NEW-YORK—PRINTED BY THOMAS GREENLEAF.

M. D C C. X C. I J.

IMPARTIAL STATEMENT

OF THE

CONTRIVERSY

RESPECTING THE DECISION OF THE LATE



COMMITTEE

CONSTITUTION

THE OFFICIAL RECORD OF THE
PROCEEDINGS OF THE COMMITTEE

OF THE

BRITISH MUSEUM

1851

P R E F A C E.

AS the subject of the late election will probably, at this time, become a topic of general conversation, and perhaps, of legislative discussion, it may be of use to exhibit to the public an impartial view of the question.—For this purpose I have made the following collection, in which will be found the official papers relating to that case, together with the opinions of several distinguished law characters upon it.—Those opinions being different, the public must decide by a comparison of the arguments adduced in their support.—It is true, that ten of the gentlemen concur in one opinion, and only three in the other: but reason, and professional eminence, and not numbers, ought to prevail in a controversy of this nature.

REF A C E

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AN
IMPARTIAL STATEMENT, &c.

STATEMENT of the CASE by the CANVASSERS.

OTSEGO.

BY the 26th section of the constitution of the state of New-York, it is ordained, That sheriffs and coroners be annually appointed, and that no person shall be capable of holding either of the said offices for more than four years successively, nor the sheriff of holding any other office at the same time. By the ninth section of the act for regulating elections, it is enacted, That one of the inspectors shall deliver the ballots and poll-lists, sealed up, to the sheriff of the county, and, by the tenth section of the said act, it is further enacted, That each and every sheriff of the respective counties in this state shall, upon receiving the said enclosures, directed to be delivered to him as aforesaid, without opening or inspecting the same, or any or either of them, put the said enclosures, and every of them, into one box, which shall be well closed and sealed up by him, under his hand and seal, with the name of his county wrote on the box, and be delivered by him into the office of the secretary of this state, where the same shall be safely kept by the secretary, or his deputy. By the eleventh section of the said act, all questions arising on the canvass and estimate of the votes, or on any of the proceedings therein, shall be determined by a majority of the members of the joint committee attending, and their judgment shall be final, and the oath of the canvassers requires them faithfully, honestly, and impartially to canvass and estimate the votes contained in the boxes delivered into the office of the secretary of this state by the sheriffs of the several counties.

On the 17th of February, 1791, Richard R. Smith was appointed sheriff of the county of Otsego, and his commission gives him the custody of that county until the 18th of February, 1792. On the 13th of January, 1792, he writes a letter to the council of appointment, informing them, that as the year for which he was appointed had nearly elapsed, he should decline a re-appointment.

On the 30th of March, 1792, the council of appointment appointed Benjamin Gilbert to the office of sheriff of the said county, with a commission, in the usual form, to keep the county until the 17th of February next. His commission was delivered to Stephen Van Rensselaer, Esq. on the 13th of April last, to be forwarded by him to the said Benjamin Gilbert. By the affidavit of the said Benjamin Gilbert, herewith delivered, it appears, that he qualified into the office of sheriff on the 11th day of May, 1792. On the first Tuesday in April, 1792, Richard R. Smith was elected supervisor of the town of Otsego, in said county, and, on the first Tuesday in May, took his seat at the board of supervisors, and assisted in the appointment of loan officers for the county of Otsego. By the affidavit of Richard R. Smith, herewith delivered, it appears, that the ballots taken in the county of Otsego were delivered to him as sheriff, and by him enclosed in a sufficient box, on or about the 3d of May, which box he then delivered into the hands of Leonard Goes, a person specially deputed by him for the purpose of delivering the said box into the hands of the secretary of this state, which was accordingly done, as appears by information from the secretary.

A small bundle of papers, enclosed and sealed, was delivered to the secretary with the box, on which is written, "The votes of the town of Cherry-Valley, in the county of Otsego--Richard R. Smith, sheriff." Several affidavits, herewith delivered, state certain facts respecting this separate bundle, said to be the votes of Cherry-Valley.

On this case arise the following questions:

1. Was Richard R. Smith the sheriff of the county of Otsego when he received and forwarded the ballots by his special deputy?
2. If he was not sheriff, can the votes sent by him be legally canvassed?
3. Can the joint committee canvass the votes when sent to them in two parcels, the one contained in a box, and the other contained in a paper, or separate bundle? Or,
4. Ought they to canvass those sealed in the box, and reject the others?

T I O G A.

It appears that the sheriff of Tioga delivered the box, containing the ballots, to B. Hovey, his special deputy, who set out, was taken sick on his journey, and delivered the box to H. Thompson, his clerk, who delivered it into the secretary's office. Question---Ought the votes of Tioga to be canvassed?

CLINTON.

It appears, that the sheriff of Clinton delivered the box, containing the ballots to Theodorus Platt, Esq. who had no deputation, but who delivered them into the secretary's office, as appears by his affidavit. Question—Ought the votes of Clinton to be canvassed?

Mr. BURR's OPINION to the CANVASSERS.

OTSEGO.

THE duration of the office of sheriff in England, having been limited by statute to one year, great inconveniences were experienced, as well by suitors as by the public. To remove which, it was thought necessary to pass an act of parliament. The statute of 12 Ed. IV. ch. 1. recites at large these inconveniences, and authorizes the sheriff to execute and return writs in the term of St. Michael, before the delivery of a writ of discharge, notwithstanding the expiration of the year. The authority given by this statute, being to execute only certain specified duties, the remedy was not complete, and another statute* was soon after passed, permitting sheriffs to do every act pertaining to the office, during the term of St. Michael and St. Hillary, after the expiration, of the year, if not sooner discharged. The practice in England appears to have been conformable to these statutes,† though the King did pretend to dispense with them by force of the royal prerogative; and this claim and exercise of a power in the crown, to dispense with and controul the operation of statutes, has been long and universally condemned as odious and unconstitutional, yet the form of the commission is said still to be during pleasure.

These considerations tend to shew the principles of several opinions and adjudications, which are found in English law-books, relative to the holding over of the office of sheriff.

None of the statutes of England or Great Britain continued to be laws of this state, after the first of May, 1778. So that at present, there remains no pretence for adopting any other than the obvious meaning of the constitution, which limits the duration of the office to one year, beyond which, the authority to hold cannot be derived from the constitution, the appointment, or the commission. If inconveniences arise, remedies can be provided by *law only*, as has in similar cases been done in Eng-

* 17. Ed. IV. ch. 7, more general.

† 2. Hawks. 5. 51. Irish ed. edit. 2. mod.—261. Statute 1. Wm. and Ma. sess. 2. ch. 2. See also sec. 12. of the same Statute.

land, deciding on legal principles; therefore, the appointment and commission, and with them, the authority of Mr. Smith, must be deemed to have expired on the 18th of February.

Yet there are instances of offices being exercised by persons holding under an authority apparently good, but which, on strict legal examination, proves defective; whose acts, nevertheless, are with *some limitations* considered as valid. This authority is called *colourable*, and the officer in such cases is said to be an officer *de facto*; which intends an intermediate state, between an exercise strictly lawful, and one without such colour of right. Mr. Smith does not appear to me to have holden the office of sheriff on the 3d of May under such colour or pretence of right. The term of his office had expired, and he had formally expressed his determination, not to accept a re-appointment; after the expiration of the year, he accepted, and even two days before the receipt of the ballots, openly exercised, an office incompatible with that of sheriff; and it is to be inferred from the tenor of the affidavits, that he then knew of the appointment of Mr. Gilbert. The assumption of this authority by Mr. Smith, does not even appear to have been produced by any urgent public necessity, or imminent public inconvenience. Mr. Gilbert was qualified in season to have discharged the duty, and for aught that is shewn, his attendance, if really desired, might have been procured still earlier.

Upon all the circumstances of this case, I am of opinion.

1st. That Mr. Smith was not sheriff of Osego, when he received and forwarded the ballots.

2d. That the ballots delivered by the deputy of Mr. Smith, cannot be legally canvassed.

The direction of the law is positive, that the sheriff shall put all the inclosures into one box: How far his inattention or misconduct in this particular, shall be deemed to vitiate the ballots of a county, appears to be left to the judgment of the canvassers. Were the ballots of this county, subject to no other exception, than that stated in the third and fourth questions, I should incline to think it one of those cases, in which the discretion of the canvassers might be safely exercised; and that the ballots contained in the boxes might be legally canvassed; those in the separate package, do not appear to be subject to such discretionary power; the law does not *permit* them to be estimated. But the extent to which this power might be exercised in cases similar in kind, but varying in degree, cannot be precisely defined. Instances may doubtless be supposed, in which sound discretion would require, that the whole should be rejected.

CLINTON.

To the question, relative to the ballots of this county, it may suffice to say, that verbal and written deputation by a sheriff, are, in law, considered as of equal validity, particularly when it is to perform a single ministerial act.

TIOGA.

It is said, that a deputy may make a deputy to discharge certain duties, merely ministerial; but considering the importance of the trust, in regard of the care of the ballots, and the extreme circumspection, which is indicated in the law relative to elections: I think that the ballots of this county cannot, by any fiction or construction, be said to have been delivered *by the sheriff*; and am of opinion, that they ought not to be canvassed.

New-York, June 8th, 1792.

AARON BURR.

Mr. KING's OPINION to the CANVASSERS,---OTSEGO.

IT may be inferred, from the constitution and laws of the state, that the office of sheriff is held during the pleasure of the council of appointment, subject to the limitation contained in the 26th section of the constitution. The sheriff may therefore hold his office for four years, unless within that period a successor shall have been appointed, and shall have entered upon the execution of the office. The term of four years from the appointment of R. R. Smith not having expired, and B. Gilbert not having entered upon the execution of the office before the receipt and delivery of the votes by R. R. Smith to his deputy---I am of opinion that R. R. Smith was then lawful sheriff of Otsego.

This opinion is strengthened by what is understood to be practice, namely, that the office of sheriff is frequently held for more than a year under one appointment.

R. R. Smith's giving notice to the council of appointment, of his disinclination to be re-appointed, or his acting as supervisor, cannot in my opinion, be deemed a resignation or surrender of his office.

Should doubts, however, be entertained, whether R. R. Smith was *lawfully* sheriff when he received and delivered the votes to his deputy, the case contains facts which in another view of the subject are important. It appears that R. R. Smith was appointed sheriff of Otsego on the 17th of February, 1791, and afterwards entered upon the execution of his office; that no other person was in the execution of or claimed the office after the date of his appointment, and before the time when he received and delivered the votes of the county to his deputy; that during that interval, R. R. Smith was sheriff, or the county was without a sheriff; that R. R. Smith, during the election, and when he received and delivered the votes to his deputy, continued in the actual exercise of

the shrievalty, and that under colour of a regular appointment. From this statement it may be inferred, that if R. R. Smith, when he received and delivered the votes to his deputy, was not *de jure*, he was *de facto*, sheriff of Otsego.

Though all the acts of an officer *de facto* may not be valid, and such of them as are merely voluntary and exclusively beneficial to himself, are void, yet such acts as tend to the public utility, and such as he would be compellable to perform, such as are essential to preserve the rights of third persons; and without which they might be lost or destroyed, when done by an officer *de facto*, are valid.

I am therefore of opinion, that admitting R. R. Smith, when he received and delivered the votes to his deputy, was not *de jure* sheriff, yet that he was *de facto* sheriff, and that his receiving and delivering the votes, being acts done under colour of authority, tending to the public utility, and necessary to the carrying into effect the rights of suffrage of the citizens of that county, they are, and ought to be deemed valid: and consequently the votes of that county may lawfully be canvassed.

2d question. The preceeding answer to the first question renders an answer to the second unnecessary.

3d and 4th questions. The sheriff is required to put into one box every inclosure delivered to him by an inspector, appointed for that purpose by the inspectors of any town or district, and for omitting to put any such inclosure into the box, he is liable to prosecution; but in case of such omission, the votes put into the box, and seasonably delivered into the secretary's office, may, notwithstanding such omission, be lawfully canvassed; and equally so, whether the omitted enclosure be kept back or sent forward with the box to the secretary's office. I am therefore of opinion, that the votes contained in the box may lawfully be canvassed; but that those contained in a separate packet, from considerations explained in the depositions, and distinct from the objection of not being included within the box, cannot be lawfully canvassed.

CLINTON.

The deputy having no interest in the office of sheriff, but being merely the sheriff's servant, it does not seem to be necessary that the evidence of his being employed or made a deputy should be a deed or an instrument in writing, though the latter would be proper, yet a deputy may be made by *parol*; I am therefore inclined to the opinion, that the votes of Clinton may be canvassed.

TIOGA.

The sheriff is one who executes an office in person or by deputy, so far at least as the office is ministerial; when a duty is required of the sheriff conomine, he may execute it in person or

[11]

by deputy; but if the deputy appoints a deputy, it may be doubtful whether ordinarily the acts of the last deputy are the acts of the sheriff: The present instance is an extreme case; had the duty been capable of being performed within the county*, the sheriff or another deputy could have performed: Here the deputy being in the execution of his duty, and without the county, is prevented by the act of God from completing it, the sheriff could not appoint, and the deputy undertakes to appoint a deputy, to finish his duty, who accordingly does so. The election law is intended to render effectual the constitutional right of suffrage, it should therefore be construed liberally, and the means should be in subordination to the end.

In this case it may be reasonably doubted, whether the canvassers are obliged to reject the votes of Tioga.

(Copy)

RUFUS KING.

* *Mr. King presumes, that the town of Franklin (being three days journey from Hovey's home) must be without the county of Tioga.*

The CERTIFICATE of a majority of the CANVASSERS to GEORGE CLINTON, PIERRE VAN CORTLANDT, &c.

STATE OF NEW-YORK, to wit.

WE the subscribers, being the major part of the joint committee appointed by the senate and assembly, in pursuance of the act, entitled, "An act for regulating elections," to canvass and estimate the votes taken at the last election for Governor, lieutenant Governor and senators, having met for that purpose at the office of the secretary of this state, on the last Tuesday of May last; and there, on that day, and the eleven succeeding days (Sundays excepted) canvassed and estimated the votes taken for governor, lieutenant governor and senators, at the said last election—DO, upon the said canvass and estimate, determine and declare, that George Clinton was, by the greatest number of votes, at the said election, chosen governor of this state; and that Pierre Van Cortlandt was, by the greatest number of votes, at the said election, chosen lieutenant governor of this state: And that Henry Cruger, John Schenck and Selah Strong were, severally and respectively, by the greatest number of votes, at the said election, in the southern district of this state, chosen senators in the said southern district; and that Joseph Hasbrouck was, by the greatest number of votes, at the said election, in the middle district of this state, chosen a senator in the said middle district; and that John Frey was, by the greatest number of votes, at the said election, in the western district of this state, chosen a senator in the

said western district, in the room of Peter Schuyler, deceased ; and that Robert Woodworth and John Livingston were, severally and respectively, by the greatest number of votes, at the said election, in the eastern district of this state, chosen senators in the said eastern district.

GIVEN under our hands, at the said office of the secretary of this state, in the city of New-York, the twelfth day of June, in the sixteenth year of the independence of this state, and in the year of our Lord one thousand seven hundred and ninety-two.

DAVID GELSTON,
THOMAS TILLOTSON,
MELANCTON SMITH,
DANIEL GRAHAM,
PIERRE VAN CORTLANDT, jun.
DAVID M'CARTY,
JONATHAN N. HAVENS,

The PROTEST of Messrs. JONES, ROOSEVELT and GANSEVOORT.

WE the subscribers, members of the joint committee, appointed to canvass and estimate the votes taken at the last election in this state for governor, lieutenant governor and senators, **DO DISSENT** from and **PROTEST** against the determination of the major part of said committee, respecting the votes taken at the said election, in the county of Otsego.

I. Because these votes, having been given by the freeholders of Otsego, and the packages containing the same having been received, and transmitted in season to the secretary's office, by the person acting as sheriff of the county, the committee have no right to reject them, under the pretence of judging of the legality, validity, operation, or extent of the sheriff's authority or commission: These questions being foreign to the duty of their appointment, and capable of a decision, only in the ordinary courts of law.

II. Because, if the committee was by law authorised to examine, and determine the legality and extent of the sheriff's authority and commission, we are of opinion, that Richard R. Smith, at the time he received and transmitted the ballots, was the lawful sheriff of Otsego. By the constitution, the sheriff, whatever may be the form of his commission, must hold his office during the pleasure of the council of appointment, and by the law of the land, he must continue therein until another is appointed, and takes upon himself the office. Richard R. Smith, having been appointed on the 27th of February, 1791, and Benjamin Gilbert having been appointed on the 30th of March, 1792, but not hav-

ing qualified, or taken upon himself the office, until Richard R. Smith had received and transmitted the ballots : Richard R. Smith, at the time he received and forwarded the same, must be deemed the lawful sheriff of the county. The uniform practice which has prevailed since the establishment of the constitution, precludes all doubt respecting its true construction on this point. For, although the commissions of the sheriffs are for one year, they have, nevertheless, continued to exercise the office until others were appointed, and entered upon the execution thereof; which has often been long after the expiration of the year, and sometimes after the same person has remained in office more than four years successively. And such sheriffs, sometimes, after the expiration of their year, at others, after having held the office for four successive years, have received and transmitted ballots for governor, lieutenant governor and senators, which ballots have, on former elections, been received and canvassed; and even upon the present canvass, the committee have canvassed the ballots taken in the counties of Kings, Orange and Washington, notwithstanding the year had expired, for which the sheriffs of these counties were commissioned, and no new commissions had been issued. Hence the sheriffs of those counties, in receiving and transmitting the ballots, must have acted under their former commissions, since a mere appointment, without a commission, and a compliance with the requisites prescribed by law, could not in our opinion, give any authority as sheriff to the person so appointed.

III. Because, if Richard R. Smith, at the time he received and forwarded the ballots, was not sheriff, the county was without a sheriff, a position, too mischievous to be established by a doubtful construction of law.

IV. Because, if Richard R. Smith, was not of right sheriff of the county, at the time he received and forwarded the ballots, he was then sheriff in fact of that county; and all the acts of such an officer, which tend to the public utility, or to preserve and render effectual the rights of third persons, are valid in law.

V. Because, in all doubtful cases, the committee ought, in our opinion, to decide in favour of the votes given by the citizens, lest by too nice and critical an exposition of the law, the rights of suffrage be rendered nugatory.

We also dissent from, and protest against the determination of the major part of the said committee, respecting the votes taken, at the said election, in the county of Clinton;

Because it appears, that the sheriff of the said county deputed a person by parol, to deliver the box containing the ballots of the said county into the secretary's office. Such deputation we deem to be sufficient; and as there is satisfactory evidence, that the box

was delivered in the same state in which it was received from the sheriff, the votes, in our opinion, ought to be canvassed.

We also dissent from, and protest against the determination of the major part of the said committee, by which they declare, that George Clinton was, by the greatest number of votes taken at the last election, for Governor, Lieutenant-Governor and senators, chosen Governor of this state: And that Pierre Van Cortlandt was, by the greatest number of votes, at the said election, chosen Lieutenant-Governor of this state: And that John Livingston was, by the greatest number of votes, at the said election, in the eastern district of this state, chosen a senator in the said eastern district;

Because it cannot be ascertained, whether George Clinton was chosen Governor, or Pierre Van Cortlandt Lieutenant-Governor of this state, by the greatest number of votes at the last election, without examining the ballots contained in the boxes delivered into the secretary's office, by the sheriffs of the counties of Otsego and Clinton—there being a sufficient number of freeholders in these counties, with the votes given in the other parts of the state, for John Jay as Governor and Stephen Van Rensselaer as Lieutenant-Governor, to give them a majority of votes for those offices: Nor can it be ascertained, whether John Livingston was chosen a senator in the eastern district, by the greatest number of votes in that district, without examining the votes taken in the county of Clinton—There being a sufficient number of freeholders in that county, with the votes given in other parts of the district, for Thomas Jenkins as a senator, to give him a greater number of votes for a senator than the number given for the said John Livingston.

SAMUEL JONES,
ISAAC ROOSEVELT,
LEONARD GANSEVOORT.

Secretary's Office, New-York, June 12, 1792.

The DISSENT of MR. SANDS.

I THE subscriber, one of the members of the joint committee, appointed to canvass and estimate the votes, taken at the last election in this state, for governor, lieutenant governor, and senators, did dissent, from the determination of the major part of the said committee, respecting the votes taken, at the said election, in the county of Otsego.

I. Because I am clearly of opinion, that Richard R. Smith was at least sheriff *de facto* of the county of Otsego, at the time he received and forwarded the ballots, and that they ought, therefore, to have been canvassed and estimated by the said committee.

II. Because, in all doubtful cases, I conceive the committee ought to decide in favour of the votes given by the citizens.

I also dissent from the determination of the major part of the said committee, respecting the votes taken at the election in the county of Clinton.

Because I am clearly of opinion, that a parol deputation was, in that case, sufficient in law; and the box, containing the ballots of that county, having been delivered into the secretary's office in due time by the person so deputed, the committee were bound, in my opinion, to canvass and estimate the votes so delivered; and the major part of said committee having refused to canvass the votes taken in either of those counties, I did not sign the return by them made--Because, in my opinion, it could not be ascertained which of the candidates had the greatest number of votes, without canvassing the ballots.

JOSHUA SANDS.

New-York, June 16, 1792:

*The REASONS ASSIGNED by the MAJORITY of the CANVASSERS,
in VINDICATION of their CONDUCT.*

THE joint committee, appointed to canvass and estimate the votes for governor, lieutenant governor, and senators, at the last election, having been constrained by a sense of their duty, in the discharge of the trust reposed in them, to reject the ballots returned from the counties of Clinton, Otsego and Tioga, and perceiving, that attempts are made to misrepresent, as well the principles of their determination, as the facts on which they are founded, feel it incumbent on them to state the grounds of their decisions.

CLINTON and TIOGA.

A box, said to contain the ballots of the county of Clinton, was deposited in the secretary's office by a Theodorus Platt, without any deputation or other authority, accompanied only by his own affidavit, that he had received the said box from the sheriff of Clinton. Another box, said to contain the ballots of the county of Tioga, was delivered by the sheriff of the county of Tioga to his deputy, Benjamin Hovey, who, being detained by illness on the road, delivered the said box to one James H. Thompson, by whom it was deposited in the secretary's office.

The joint committee, pursuant to the law, are sworn to canvass the votes "contained in the boxes delivered into the office of the secretary of the state by the sheriffs of the several counties." Hence arose a question, whether this was not a *personal trust*, which could not be legally performed by deputy. Upon this point we entertained different opinions, but agreed, that if the discretion

of the committee was to be, in any degree, controuled by the directions of the law; there appeared no room to doubt of the illegality of canvassing boxes which were not delivered by a sheriff, or the deputy of a sheriff. The ballots contained in these boxes were, therefore, rejected, not, however, without sensible regret, as no suspicion was entertained of the fairness of those elections.

O T S E G O.

It appears, that Richard R. Smith, on the 17th of February, 1791, was appointed sheriff of the county of Otsego, to hold that office until the 18th of February, 1792; that a commission was issued agreeably to that appointment: that on the 13th of January, 1792, he wrote to the governor and council, that he should decline a re-appointment; that on the 30th of March, 1792, Benjamin Gilbert was appointed sheriff of the said county; that the commission, to the said Benjamin Gilbert, was on the 13th of April, 1792, delivered to Stephen Van Rensselaer, one of the council of appointment, to be by him forwarded: that the said commission was in the hands of William Cooper, Esq. first judge of the said county, on or before the 3d of May, that the said Richard R. Smith, on the first Tuesday in April, was elected supervisor of the town of Otsego, accepted that office, and, on the first day of May, took his seat at the board of supervisors, assisted in the appointment of loan officers, and *then* declared, that he was no longer sheriff of the county, but that Benjamin Gilbert was appointed in his place. It also appeared, that Benjamin Gilbert had no notice of his said appointment, or of the receiving of the ballots by the said Richard R. Smith, until the ninth day of May, and that he was sworn to the execution of his office on the eleventh: that, on the 3d of May, the said Richard R. Smith put up the ballots of the said county in the store of the said William Cooper, Esq. in whose hands the commission of Benjamin Gilbert then was: that the box, said to contain the votes of the said county, was delivered into the secretary's office by Leonard Goes, previous to the last Tuesday in May, under a deputation from the said Richard R. Smith, together with the said box, and at the same time, the said Leonard Goes delivered a separate packet or enclosure, which, by an endorsement thereon, purported to contain "the ballots received from the town of Cherry-Valley, in the county of Otsego."

The manner of the delivery of the said box and enclosure, and the authority of the said Leonard Goes, were reported to the committee by the secretary of the state.

These votes were not canvassed, for the following reasons:

I. The committee found themselves bound, by their oath, and by the directions of the law before mentioned to canvass only the votes contained in the boxes which may have been delivered into secretary's office by the *sheriffs* of the several counties. It appeared to them absurd to suppose this duty should be so expressly enjoined, and that they should, nevertheless, be prohibited from enquiring, whether the boxes were or were not delivered by such officers; or that they should be restrained from ascertaining a fact, without the knowledge of which it was impossible that they could discharge the duty with certainty to the public, or with confidence to themselves: they could not persuade themselves that they were under *that* law and *that* oath, compelled to canvass and estimate votes, however fraudulently obtained, which should be delivered into the secretary's office by *any person filing* himself *sheriff*, though it should, at the same time, be evident to them, that he was *not the sheriff*. If such was to be their conduct, a provision intended a security against impositions, would be an engine to promote them. They conceived, therefore, that the objection to an enquiry so important, and in a case where the question was raised, and the enquiry imposed upon them by the suggestions of the secretary, must have arisen from gross misrepresentation or wilful error,

Upon investigating the right of the said Richard R. Smith to exercise that office, the facts appeared as herein before stated.

II. The constitution requires, that sheriffs shall be *annually appointed*; which, to our apprehension implies, that no person shall exercise the office by virtue of any other than *annual* appointment, and should it even be admitted, that the council may at *their pleasure* remove a sheriff within the year, yet we do not see on what ground it can be denied, that the duration of the office is limited to one year, unless a new appointment should take place. It would otherwise be true, that the council could indirectly, or by a criminal omission, accomplish what is not within their direct or legal authority. It will be readily admitted, that an appointment and commission for three years would be void, and surely the pretence of one thus claiming, should be preferred to an usurpation without even such appearance of right, and against the known right of another. To assert, therefore, that "by the constitution, the sheriff, whatever may be the form of his commission, must hold his office during the pleasure of the council of appointment, and that by the law of the land he must continue therein until another is appointed, and has taken upon himself the office," is an assertion accompanied with no proof or reason, and is repugnant to the letter and spirit of the constitution, which is eminently

the law of the land. The practice which has prevailed since the revolution, as far as hath come to our knowledge, does not warrant the position: neither could mere practice, if such had prevailed, justify the adoption of a principle contrary to the obvious meaning of the constitution--Upon the present occasion, we have not canvassed the votes of any county which were not returned by a sheriff holding his office under an appointment unexpired. The sheriffs of Kings, Orange, and Washington, had all been re-appointed within the present year, which satisfied the words of the constitution, and was the *known* and avowed reason which influenced the committee to estimate the ballots of those counties. The doctrine concerning the constitutional pleasure of the council in the appointment of the office of sheriffs *had not then been invented.*

III. But even admitting the visionary idea, that the office of sheriff (*whose duration is limited by the constitution*) can nevertheless be holden *during the pleasure* of the council of appointment, yet that appears to have been determined by the letter of the appointment and commission, by the appointment of Benjamin Gilbert, by the declaration of Richard R. Smith, and by his acceptance and exercise of another office, which is by the constitution, declared to be incompatible with the office of sheriff.

It was evident therefore, that Richard R. Smith, had no authority by appointment, by commission, by the constitution, or by any law, to hold or exercise the office of sheriff on the third of May.

IV. As Richard R. Smith, was not legally or constitutionally sheriff on the third of May, neither, under the circumstances of the case, can he be said to have been sheriff in fact, so as to render his acts valid in contemplation of law. The assumption of power by Mr. Smith, appears to have been warranted by no pretence or colour of right. The time limited for the duration of his office, had expired by the express tenure of his commission and appointment, and he had formally declared his determination not to accept a re-appointment. He had two days previous to his receiving the ballots, openly exercised an office incompatible with that of sheriff, then declared that he had resigned the office of sheriff, and that Benjamin Gilbert was appointed in his place; and by an affidavit which was produced to the committee it appeared, that upon the day upon which he put up the ballots in the house of the said William Cooper; he the said R. Richard Smith declared that he had resigned the office of sheriff. The business might, with equal care and certainty, have been executed by Benjamin Gilbert. The single act of receiving ballots, could of itself continue *no man* a sheriff--least of all, a *man disavowing that office,*

and then in the exercise of another. It was foreign to the duty of the committee to provide against evils which may possibly arise from casual vacancies in the office of sheriff, by death and otherwise; vacancies will sometimes unavoidably happen without further legislative provision.

There is not therefore, in our opinion, any application to the subject, or force in the objection, "that if Richard R. Smith was not sheriff, the county was without a sheriff," neither is the position true in fact. For it appears that the county was not then without a sheriff. At the time the ballots were received, it was well known that Benjamin Gilbert was appointed sheriff, and that his commission was in the hands of *William Cooper, in whose store Richard R. Smith put up the ballots.* It is also to be fairly inferred, that had proper measures been taken to give notice to Mr. Gilbert, he would forthwith have qualified & undertaken the execution of the office. It cannot therefore, consistent with truth or candor, be asserted, that there was the remotest probability, that "*mischief*" could in any parallel case ensue, from the principles adopted by the committee.

It did not seem possible, therefore, by any principle of law, by any latitude of construction, to canvass and estimate the ballots contained in the box thus circumstanced.

But had the question been doubtful, it was attended by other circumstances which would have determined the committee against canvassing those ballots.

V. Because the notice of the appointment of Benjamin Gilbert was received by Richard R. Smith, on or before the first of May, and his commission was received by William Cooper, on or before the 3d of May. Mr. Gilbert might therefore have been notified, qualified and executed the duty. He did actually qualify on the eleventh, which gave ample time to have forwarded the ballots before the last Tuesday in May. These facts with other suggestions of unfair practices, rendered the conduct of the Otsego election justly liable to suspicion; and the committee were constrained to conclude, that the usurpation of authority, by Richard R. Smith, was wanton and unnecessary, and proceeded from no motive connected with the preservation of the rights of the people, or the freedom *and purity of elections.*

VI. Because having in several instances by *unanimous vote*, rejected ballots of whole towns, free from any suspicion of unfairness, by reason of a defect in *form only* of the return, the committee conceived themselves the more strongly bound to reject ballots where the defect was substantial and the conduct at least questionable; especially as the law regards the custody of enclosures containing the ballots as a trust of high importance, and contem-

plates but three persons in whose hands they are to be confided until they come to the possession of the canvassers, to wit, the inspector, the sheriff and the secretary; all officers of great responsibility and confidence.

VII. Because the return upon the face of it appeared to be illegal. The law requires the sheriff "upon receiving the said enclosures, directed to be delivered to him as aforesaid, without opening or inspecting the same, or any or either of them, to put the said enclosures, & *every of them into one box*, which shall be well closed, &c. and be delivered by him, without opening the same, or the enclosures therein contained, into the office of the secretary of this state, before the last Tuesday in May in every year."

By recurring to the preceding state of facts, it will be evident, that this direction of the law had been disregarded. If irregularities of this kind should be permitted and countenanced, it would be in the power of the sheriff, by excluding a part of the votes, to confer a majority on any candidate in counties where there were divisions of interests. Affidavits were indeed produced, tending to shew, that there had been, in that town, disputes respecting the election of town officers; that two enclosures purporting to contain the votes of the town, were delivered to Mr. Smith, and that he had put into the box that enclosure which contained the votes taken by the persons whom *he judged* to be the legal inspectors: A matter proper to have been submitted to the opinion of the committee.

The committee have considered this subject with deliberate attention, and in every light in which it could be placed: and whether they regarded the channels of conveyance, the mode of the return, or the general principles which ought to govern their decisions, touching the freedom of elections, and security against frauds, they found undeniable reasons, which compelled them to reject the votes.

DAVID GELSTON,
THOMAS TILLOSTON,
DANIEL GRAHAM,
MELANCTON SMITH,
DAVID M-CARTY,
P. V. CORTLANDT, jun.
JONA. N. HAVENS.

New-York, June 15, 1792.

LAW OPINIONS.

The OPINION of three LAWERS of ALBANY.
C A S E.

On the 21st day of February, 1791, Richard R. Smith was appointed sheriff of Otsego, and his commission gives him the custody of that county, from the said 21st day of February, until the 22d day of February, 1792.

On the 30th March, 1792, the council of appointment appointed Benjamin Gilbert to the office of sheriff of the said county, in the room of Mr. Smith.

On the first Tuesday in April, 1792, Mr. Smith was elected supervisor of the town of Otsego, in said county, and on the first Tuesday in May took his seat at the board of supervisors, and assisted in the appointment of loan-officers for the county of Otsego.

By the constitution of this state, it is declared, that no sheriff shall be capable of holding his office more than four years successively, nor of holding any other office at the same time.

On the last Tuesday in April the general election was held according to law in the said county, and the poll-lists and ballots were afterwards duly delivered to Richard R. Smith, as sheriff of the said county, and were by him sent to the secretary's office, in the usual form, under his seal and signature.

The commission of the new sheriff was made out before the general election, but not delivered to him, nor did he qualify or in any respect enter on the execution of his office, until after the poll lists and ballots had been communicated to a deputy, by the old sheriff to be carried to the secretary's office.

On the preceeding case, the following question arises, viz.

1. Whether Richard R. Smith, at the time of receiving and sending down the poll lists and ballots of Otsego, was sheriff for that purpose?

A N S W E R.

WE are of opinion, that Mr. Smith continued sheriff of Otsego, until the new sheriff accepted and was sworn in office, and all his acts previous to that time were valid.

That the acceptance of the office of supervisor by Mr. Smith, did not discharge him from the office of sheriff; and for these reasons we conceive the return of the poll list and ballots by him to be regular.

STEPHEN LUSH,
T. V. W. GRAHAM,
ABM. VAN VECHTEN.

May 24, 1792.

The OPINIONS of SEVEN LAWYERS in the CITY of NEW-YORK.

THE Otsego votes yet to be canvassed, have greatly excited public attention. Anonymous writers have debated the question on those votes, with a view no doubt to influence, direct or assist the judgement of the canvassers. Their real names affixed to their publications might not perhaps have lessened the weight of their opinions. There are occasions when silence is not the virtue of a good citizen. If attempts are at any time made tending to the infringement of general rights, to oppose them with firmness, is certainly justifiable. From a sense of duty, a desire to satisfy our fellow-citizens on this important subject, a regard to *the tranquility of the state*, and a conviction that our opinion is founded on *undisputed principles of law*, we have ventured to offer it in this public manner.

This conduct, though perhaps novel, we trust is not reprehensible; and we can hardly believe that any one, to whatever party he may belong, will consider us as actuated by improper motives. Should any man, who claims to be a lawyer, oppose this opinion, and give *his name* to the public, with his reasons, we pledge ourselves to support it.

C A S E.

By the 26th section of the constitution of this state, it is declared, that sheriffs be annually appointed, and that no person shall be capable of holding the office more than four years successively, nor of holding any other office at the same time; and by the 28th section it is also declared that where by the constitution, the duration of any office shall not be ascertained, such office shall be construed to be held during the pleasure of the council of appointment.

On the 21st day of February, 1791, Richard R. Smith was appointed sheriff of Otsego, and his commission gives him the custody of that county from the said 21st day of February, until the 22d day of February, 1792, and previous thereto he wrote a letter to the governor and council of appointment, begging leave to decline a re-appointment to the said office.

On the 30th of March, 1792, the council of appointment appointed Benjamin Gilbert to the office of sheriff of the said county, in the room to Mr. Smith.

On the first Tuesday in April, 1792, Mr. Smith was elected supervisor of the town of Otsego in said county, and on the first Tuesday in May took his seat at the board of supervisors, & assisted in the appointment of loan-officers for the county of Otsego.

On the last Tuesday in April, the general election was held according to law in the said county, and the poll lists and ballots were afterwards duly delivered to Richard R. Smith as sheriff of

the said county, and were by him sent to the secretary's office in the usual form, under his seal and signature.

The commission of the new sheriff was made out before the general election, but not delivered to him, nor did he give the security required by law, nor qualify, nor in any respect enter on the execution of his office, until after the poll lists and ballots had been committed to a deputy, by the old sheriff, to be carried to the secretary's office.

On the preceeding case, the following question arises, viz. Whether Richard R. Smith, at the time of receiving and sending down the poll lists and ballots of Otsego, was sheriff for that purpose?

A N S W E R.

Although the office of sheriff be limited by the constitution to four years, yet, during that term it is held at the pleasure of the council of appointment. There can be no doubt that the words of the constitution are merely directory to the council, and do not work any limitation of the office within the four years. The pleasure of the council is expressed by the commission they issue, which is nothing more than a designation of the person to whom the office is granted, and does not alter the tenure of the office, as prescribed by the constitution; the commission, however, cannot, of itself, attach to the new sheriff, the rights appertaining to the office, or divest the ancient sheriff of them; to effect these objects, the new sheriff must accept his commission, and the ancient sheriff must have notice thereof.

If a different doctrine were to prevail, there might frequently be a failure of justice for want of a sheriff in the actual exercise of the office. For these reasons we are of opinion, that Mr. Smith, when he received the votes and forwarded them to the secretary's office, was of right, sheriff of the county. But whether Mr. Smith was the rightful sheriff or not, cannot, we suppose, be material. It is sufficient to entitle the votes to be canvassed, that Mr. Smith was the only acting sheriff of the county. No rule of law is better established than that all necessary acts done by officers in fact or persons having colour of legal authority, where such acts affect third persons who have a right to the things done or which concern the public good are to be supported from the necessity of the case. In the present instance, the suffrages of the electors of Otsego county might have been lost for want of a returning officer if the acting sheriff had not received, and forwarded them. It is also to be observed, that the law upon every occasion should be liberally expounded to protect and enforce the rights of suffrage as constituting the basis upon which the freedom of our government depends.

We do not conceive that the letter which Mr. Smith wrote to the council vacated his office; or that his acting as supervisor could invalidate his acts as sheriff; but he might be liable to punishment, if he persisted to execute the two offices.

RICHARD HARRISON,
JOHN LAWRENCE,
JOHN COZINE,
CORNELIUS J. BOGART,
ROBERT TROUP,
JAMES M. HUGHES,
THOMAS COOPER.

June 7, 1792.

The OPINION of PIERPOINT EDWARDS, Esq.

BY the 26th section of the constitution it is ordained, "That sheriffs and coroners be annually appointed; and that no person shall be capable of holding either of the said offices more than four years successively, nor the sheriff of holding any other office at the same time."

By the 35th section, it is, among other things, ordained, "That all such part of the said common law, and all such statutes (meaning the common law of England, and statutes of England and Great-Britain) as are repugnant to the constitution, be, and they are hereby abrogated and rejected."

None of the statutes of England or Great-Britain have been, since the first day of May, 1788, laws of the state of New-York, those statutes having been repealed.

Mr. King's statement of the case, relative to the votes of Otsego county, is, I presume, in point of fact, just—upon that statement, therefore, I shall found my opinion.—

Should it be admitted, that by the common law of England, a sheriff may hold his office after the expiration of the year for which he was appointed, and until another is appointed and qualified, that common law, if repugnant to the constitution of New-York, can have no operation on the decision of the present question. No remarks therefore need be made upon the numerous English statutes relative to sheriffs, or upon the exposition which those statutes have received.

If the meaning of the words—"That Sheriffs and Coroners be annually appointed," can be ascertained and fixed with clearness, the question respecting the rejection of the Otsego votes will be solved.—Sheriffs are to "be annually appointed," therefore they cannot be appointed biennially, or triennially; they are to be appointed once a year and by the council of appointment. The council of appointment have no authority to appoint sheriffs, but what

is given by the constitution—independent of the authority which they derive from the constitution, they cannot appoint a sheriff: When therefore the constitution gives them authority to appoint in a specified manner, they cannot appoint in any other manner, and if they do appoint in any other manner, they appoint without authority, and of course the appointment is void, and the person appointed is not a lawful sheriff.

Whenever the council of appointment appoints a person to be a sheriff, he is appointed (if the appointment is made according to the constitution) for one year;—the constitution has authorised the council of appointment to make such an appointment, and no other. The person thus appointed sheriff is sheriff in virtue of the appointment.

The constitution has given to the council of appointment authority to communicate by the act of appointment, to the person appointed, the power of being sheriff for one year: the person appointed sheriff, derives his power wholly from the appointment, he can therefore possess no greater power, than is, by the act of appointment communicated;—the act of appointment gives to him a power to be sheriff for one year only, therefore he cannot be, in virtue of his appointment, sheriff one moment beyond the termination of the year for which he was appointed.

If Mr. Smith was sheriff of the county of Otsego on the 3d day of May, 1792, he was sheriff without an appointment, for the year expired for which he was appointed on the 17th of the preceeding February:—His commission gave him charge of the county until that time, and no longer, so that he was sheriff not only without any act of appointment, made by the council of appointment, but without any commission for that purpose.—But by the 23d section of the constitution, “all officers other than those who by the constitution are directed to be otherwise appointed, shall be appointed by the council of appointment.”—But if Mr. Smith was sheriff on the 3d day of May, 1792, there was a sheriff in the state of New-York who was not appointed sheriff by the council of appointment—nor can the circumstance of there being no successor to Mr. Smith, in the office of sheriff of Otsego, appointed, give Mr. Smith a power to be sheriff on the 3d day of May, 1792, or at any moment after the expiration of the year for which he was appointed sheriff—for if such a circumstance can make him sheriff, after the year for which he was appointed, then there are two modes of making sheriffs constitutionally—one by appointment of the council of appointment, another by the council of appointment not making any appointment—that is, a man may be a sheriff without being appointed or even commissioned.—Fur-

ther if such a circumstance could make Mr. Smith sheriff on the 3d of May 1792, the same circumstance continuing to exist, will make him sheriff on the 3d day of May, 1794, so that the council of appointment will in fact in the case supposed, by appointing Mr. Smith sheriff of Otsego county on the 18th day of February 1791, for one year, have appointed him sheriff of that county for three years and three months.—But is this appointing sheriff annually? Proceeding in this way, the council of appointment evade the 26th section of the constitution and render it completely inoperative.

It will be inconvenient that a county be destitute of a sheriff, but if this consideration could authorize Mr. Smith to be sheriff of Otsego county on the 3d day of May 1792, it would authorize him to be sheriff on the 3d day of May, 1796, if no new appointment shall have been made before that time; for the latter part of the 26th section, declaring sheriffs incapable of holding that office more than four years successively, cannot be more obligatory or sacred than the first part, and this kind of inconvenience may as well annihilate the one as the other; besides there will be a plain maxim of law and common sense, to justify such a measure, if holding over the office for three months after the first appointment for the reasons which are urged can be justified "*ubi eadem est ratio, ibi idem jus*"—and the reason of his continuing to act as sheriff until the 3d of May 1796, will exist with as much force, after the 17th day of February 1795, as it did on the 3d day of May, 1792, if no new sheriff shall have been appointed—Arguments from inconvenience deserve the greatest attention, agreeably to the maxim "*Argumentum ab inconvenienti plurimum valet in Lege*;" but if the rule of law be plain and explicit, it is in vain to insist upon inconveniences—They can never be used with legal propriety, but in cases where the operation of a law will necessarily produce an inconvenience or mischief contrary to the spirit and intent of the law itself, or of some other known established principle of law.—Upon an examination of the cases, in which the "*argumentum ab inconvenienti*," has been applied in our law books, the foregoing proposition will be found to be just: But in the instance in question, the inconvenience insisted upon, does not arise from the operation of the 26th section, but arises from a neglect on duty, on the part of the council of appointment, in not appointing seasonably a new sheriff—and it would be a strange doctrine of law, that negligence and unfaithfulness in the executive shall be a constructive repeal of an article in a fundamental constitution, which could not be repealed or in the smallest degree altered by the supreme legislature of the state.

If it is true, that the non-appointment of a sheriff after the expiration of the year for which a sheriff is appointed, can produce the effect of making the old sheriff, sheriff until another is appointed, the 26th section should be new modelled, and made to express in plain words its true meaning, it ought to read thus: "That sheriffs and coroners be annually appointed; and that no person shall be capable of holding either of the said offices more than four years successively, nor the sheriff of holding any other office at the same time; but if the council of appointment shall neglect their duty and not appoint sheriffs and coroners annually, the sheriffs and coroners first appointed shall respectively hold their offices until the council of appointment shall be brought to a sense of their duty, and make other appointments."

There is another point of light in which this subject may be viewed, which will shew most clearly, that Mr. Smith was not sheriff of the county of Otsego on the third of May, 1792.

The words of the 26th section are: "that sheriffs and coroners be annually appointed"—The expression is in strong terms mandatory—It amounts to saying, the council of appointment *shall* appoint sheriffs annually.

To comply with this injunction the council of appointment having appointed a sheriff for Otsego on the 18th of February, 1791, must make a new appointment of a sheriff for that county within, or, at the expiration of a year from that time. But if it be admitted, that the council of appointment can appoint a sheriff on the 18th day of February 1791, who will, under that appointment, be a sheriff on the third day of May 1792, then the constitution has authorised the council of appointment to appoint a sheriff who may continue in office longer than a year, and yet has positively and unconditionally ordered them to prevent that appointment from having any such effect, by making a new appointment within or at the expiration of a year—that is, the framers of the constitution, upon this idea, have said, *you shall appoint annually; you shall suffer no appointment to continue longer than a year, but shall prevent its continuance for a longer time, by making a new one; but you may, all this notwithstanding, make appointments of sheriffs, which shall, if you do not obey our orders, continue longer than a year; that is, we order you to obey us, but if you do not then do as you please.*

No one will affront common sense so much as to say, that this is the meaning of the words "sheriffs and coroners be annually appointed"—No good reason can be assigned for putting a construction upon an expression in one part of the constitution, different from that which is confessedly put upon a similar expression in another part of the same constitution.

The words in the 26th section are—"That sheriffs and coroners be annually appointed—that is, *the council of appointment shall annually make choice of persons to be sheriffs and coroners.*"

By the 4th section it is ordained. "That the assembly shall consist of at least seventy members to be annually chosen in the several counties." Will any person assert, that the representatives for the city and county of New-York, chosen in April last; can sit as representatives in the legislature of New York after the first day of July, in the year 1793, provided the city and county shall neglect to make a choice in April 1793.

But why shall representatives, who the constitution says shall "*be annually chosen,*" not hold their offices after the expiration of the year, as well as sheriffs, who are to be *annually appointed*, or *annually chosen*?

Nor can it be seriously concluded, that Mr. Smith was so far *de facto* sheriff that the votes returned by him could be lawfully canvassed—a sheriff without even the form of an appointment, and without a commission, cannot be said to be a *sheriff de facto*.

The proposition, *that the acts of persons who are officers de facto, but are not such de jure, are valid, when the rights of third persons are concerned*, is true only in those cases, where they act under an appointment, good in point of form, but not made in strict precise conformity to law—this often happens in the case of corporation officers.

Nor can any practice which may have existed, that is opposed to the constitution, aid this business—Such a practice can claim the sanction of fourteen years at most, and it must sound very harshly in the ears of a man tenacious of constitutional rights, that an article of a fundamental constitution can be abrogated by a practice of only fourteen years standing, that is in the very teeth of such a constitution.

I am, for the foregoing reasons, of opinion, that Mr. Smith was to no purpose sheriff of the county of Otsego on the 3d of May, 1792.

(Signed)

PIERPOINT EDWARDS.

The OPINION of JONATHAN D. SERGEANT, Esq.

MY opinion is desired on the subject of the ballots of Otsego, Clinton and Tioga counties, in the state of New-York, in the late election of Governor of that state.

For the facts I am referred to the printed cases and opinions of Rufus King and Aaron Burr, Esquires, and the constitution and election law of New-York are before me.

Upon the facts as stated, I shall proceed to give my opinion in the same order as that, in which they have been considered by those gentlemen.

OTSEGO.

It appears to me, that Richard R. Smith was not sheriff of Otsego county, at the time of his receiving and sending forward the ballots of that county, and that those ballots could not have been canvassed consistently with the law and constitution.

The constitution* requires, that sheriffs and coroners be appointed annually. These words are plain and express. If they are appointed annually they can only be appointed for one year; and accordingly the commission to Richard R. Smith is limited in its continuance to the end of the year. It seems that no provision is made by any law for remedying the inconveniences that some times may occur, in the interval between the expiration of the former sheriff's time and the new appointment and assumption of the office by the new sheriff. Shall those who are to execute the laws undertake to provide for the exigency, or is the inconvenience to be submitted to for the moment; and shall it be left to the legislature in their wisdom to provide means for obviating the difficulty in future? The answer is obvious. The practice and principles of all states which have professed to separate the legislative power from the executive and judicial, avow the maxim, that neither the executive nor judicial have power to give law, but only to pursue the law as it is, and that a particular inconvenience ought to be preferred to a public mischief. Now there can be no greater mischief in any state than the assumption of legislative power by those who are not authorised, for neither liberty nor good government can exist where this is the case.† According we find the statute-books of England abounding with laws made to remedy inconveniences, which experience had discovered in former laws.—In the very instance of a sheriff, where the statute had expressly restricted his holding the office to one year, other statutes are passed afterwards,‡ reciting the damage that had ensued, and providing a remedy in future. Neither the executive nor the judicial undertook to remedy the inconvenience; but they waited the interposition of the legislature, who alone were authorised to redress the evil.—The English statutes relative to the office of sheriff do not extend to New-York as a rule of conduct, but the constitution affords the only rule of conduct at present on the subject; yet the rules of construction of laws are the same in New-York, as they are now and ever have been in England. Indeed I take it the principles of construction of laws are similar if not precisely the same throughout all countries that are governed by laws. From England however we first drew the principles of our jurisprudence, and by the constitution of New-York§, the common law of England, so far as it is not repugnant to that constitution, is implicitly adopted. The case then of the English statutes

* § 26. † Monthly. ‡ 12 E. 4. 17. E. 4. § 1 35.

relative to sheriffs is in point; and shews, that there is no other power, but that of the legislature, which can do away the force of plain words, either by construction or dispensation, in a case similar to the present.

But even if Mr. Smith could be supposed, upon any construction of the words of the constitution to have had it in his power to continue in the office of sheriff after the 18th day of February, 1792, when his office had expired as well by the terms of his commission as by the express words of the constitution, yet it will hardly be supposed that he was compellable to do so; and it appears, that he had formally announced his determination not to accept a re-appointment at the end of the year, and had actually accepted and exercised another office which, by the terms of the constitution, was notoriously incompatible with his continuing to be sheriff.—He appears to me to have compleatly abandoned the office of sheriff so as not to have been even sheriff *de facto* at the time of his receiving and sending forward the ballots; for having abandoned the office once after his year was out, he could not make his election a second time to resume it on a particular occasion without a re-appointment. He must have been sheriff to all purposes or to none. He could not choose what business he would do and what leave undone; to be no sheriff one day and sheriff again the next. Suppose, under the circumstances stated, that Mr. Smith, after the end of his year, had refused to serve process when tendered to him, would either he or his sureties be liable to suits? Certainly not: he was no longer sheriff; he had given notice that he would not continue beyond the year.

CLINTON.

I see no reason to doubt, that the deputation by parole in this case was sufficient.

TIOGA.

It appears to me clearly, that a special deputy, appointed for a particular purpose, cannot make a deputy, whatever the practice may have been; and I am inclined to think, that the practice where it exists, will be found to be confined to the case of undersheriffs, duly constituted, with general powers, and legally sworn into office.

I shall conclude with one observation;—that in the construction of positive laws, enacted by a competent authority, the utmost liberality that can be indulged extends no farther than to discover the meaning of the legislature, from all the words of the law taken together; and that where the words are plain and clear, the judge is bound to pursue them and leave the consequence to the legislature.

28th July, 1792. (Signed)

JONA. D. SERGEANT.

OPINION of EDMUND RANDOLPH, Esq.
NEW-YORK CASE.

BY the Constitution of New-York, it is declared, that the supreme executive power and authority of the state shall be vested in a governor; and that statedly, once in every three years, and as often as the seat of government shall become vacant, a wise and discreet freeholder of the state shall be by ballot elected governor by the freeholders, qualified to elect senators; and that the person who hath the greatest number of votes within the state shall be the governor thereof.

Laws had been passed at the first, fourth and seventh sessions of the legislature of New-York, upon the subject of elections; but these were repealed on the 13th of February, 1787, by "an act for regulating elections." It prescribes among other things, that all elections for governor shall be by ballot, that they shall be held, not by counties, but by wards, in the cities of New-York and Albany, and by cities, towns, manors, precincts and districts, in all other parts of the state; that the last Tuesday in April in every year, shall be the anniversary day, on which the elections are to be held; that the respective town clerks, supervisors and assessors in some cases, and the mayor, recorder, aldermen and common council men in two others, shall be the inspectors of the election: that the clerk of the senate shall notify to the sheriffs the choice of a governor: that each sheriff shall transmit a copy of the notification to some one inspector: that each inspector being notified, shall give notice to the other inspectors, who are to publish the election: that the inspectors shall appoint clerks for keeping the poll lists, under their direction and view: that the inspectors shall preside at every election, and conduct and direct the same, according to certain regulations, and shall be the returning officers: that on closing the poll, the poll books, or lists, shall, after due examination and correction thereof, be signed by the inspectors attending, and by the clerks: that the box containing the ballots or tickets, shall be taken out, and without being inspected, shall, together with the poll books, or lists, be immediately put up under cover, and inclosed, and the inclosure shall be bound with tape, and sealed in such manner as to prevent its being opened without discovery: That the inspectors present at closing the poll shall then put their seals, and write their names upon the same inclosure; that one of the inspectors then present, to be appointed for that purpose by a majority of them, shall deliver the same inclosure, so sealed up, to the sheriff of the county without delay: That the sheriffs shall, upon receiving the said inclosures, directed to be delivered to them as aforesaid, without opening or inspecting the same, or any or either part of them, put the said enclosures and every of them into one box, which shall be well closed and

sealed by him, under his hand and seal, with the name of his county wrote on the box, and shall be delivered by him, without opening the same, or the inclosures therein contained, into the office of the secretary of the state before the last Tuesday of May in every year; where the same shall be safely kept by the secretary, or his deputy, unbroken and unopened, until the meeting of the persons appointed to canvass and estimate the ballots therein contained, when he shall deliver all the said boxes unbroken and unopened to them: That the canvassers shall, on a certain day, proceed to open the said boxes one after the other, and the inclosures therein contained, respectively, and canvass and estimate the votes therein contained: That when they shall be able to determine who, by the greatest number of votes, shall have been chosen, they shall, without delay, make and subscribe a certificate of their determination: That all questions which shall arise upon such canvass and estimate, or upon any of the proceedings therein, shall be determined according to the opinion of the major part of the canvassers, and their judgment and determination shall, in all cases, be binding and conclusive: That the canvassers, before they proceed to open any of the boxes delivered by the sheriff, shall take and subscribe an oath, that they will faithfully, honestly and impartially canvass and estimate the votes contained in the boxes, delivered into the hands of the secretary of the state by the sheriffs of the several counties, and that they will publish and declare the person, who hath the greatest number of votes for governor, to be elected to the said office. The foregoing abstract comprises the essential parts of the election law, which remain unchanged by any subsequent act.

The last Tuesday in April, in the present year 1792, was the anniversary of the election of a governor for the state of New-York.

Difficulties have arisen on the propriety of admitting certain votes, of the counties of Otsego, Tioga, and Clinton; each of which has the following peculiar facts:

The facts concerning the county of Otsego.

The constitution provides, that sheriffs be annually appointed, and that the sheriff shall not be capable of holding any other office at the same time.

On the 17th of February 1791, Richard R. Smith was appointed sheriff of the county of Otsego, and his commission gave him the custody of that county, either for one year, which would expire on the 18th day of February, or expressly until the 18th day of February 1792.

On the 13th of January 1792, he declined a re-appointment, by a letter to the council of appointment.

On the 30th March 1792, Benjamin Gilbert was appointed sheriff of Otsego, with a commission to keep the county until the 18th day of February following, the commission was delivered to a person, to be forwarded to him; and on the 11th of May 1792, he qualified into the office.

From the 18th day of March, until the first Tuesday in May, 1792, it doth not appear that R. R. Smith performed any duty as sheriff.

On the 1st Tuesday in April 1792, the said R. R. Smith was elected supervisor of the town of Otsego, in the county of Otsego, and on the first Tuesday in May 1792, assisted as such in the appointment of loan officers for the said county.

The ballots taken in the county of Otsego for governor, were delivered by the inspectors to the said R. R. Smith as sheriff, and by him inclosed in a sufficient box, on or about the 3d day of May 1792; and the box was by him committed to the care of a person, specially deputed by him for the purpose of delivering the same to the secretary of the state, and it was accordingly delivered.

A small bundle of papers, inclosed and sealed, was delivered to the secretary with the aforesaid box; and on the bundle these words were written by the said R. R. Smith, "the votes of the town of Cherry Valley in the county of Otsego, R. R. Smith sheriff."

The situation of R. R. Smith, with respect to this office of sheriff, was communicated by the secretary of the state to the canvassers officially.

Facts concerning the county of Tioga.

The sheriff of Tioga delivered the box, containing the ballots of this county, to B. Hovey, his special deputy. Hovey set out on his mission, but being taken sick on his journey, delivered the box to H. Thompson, his clerk, who delivered it into the secretary's office.

Facts concerning the county of Clinton.

The sheriff of Clinton delivered the box, containing the ballots of this county to a person, who had no written deputation; nor any other but what appeared from his own affidavit. The box was, however, delivered into the secretary of state's office.

Upon the foregoing statement, the opinion, which I am about to give, is founded. If there be any other circumstance of real influence, it forms no part of the case, which I discuss. This remark, though proper on most occasions, is almost necessary on the present; since the solution of the various questions, turns upon the jurisprudence of New-York, with which I cannot pretend to be familiar, and which has but lately engaged my attention. In-

deed I should have altogether refused to enter into the subject, had I not known that, I might mark, with precision, the ground on which I move; and were I not conscious that, notwithstanding the warmth which has been displayed in this debate, I am a stranger to any impulse which may obstruct the pursuit of truth.

As the dispute immediately affects the three counties, Otsego, Tioga, and Clinton, I shall class my observations under those three heads.

I. THE COUNTY OF OTSEGO.

The services required from a sheriff, in the election of governor are, I acknowledge, merely of a ministerial and confidential kind. He is only to receive from the inspectors the inclosures of the ballots; to put them into a box without opening or inspecting them; to write the name of his county thereon; to enclose and seal it, and to deliver it unopened into the office of the secretary of the state. These acts, however, are important, as the fidelity and punctuality of him, who shall be employed in them, can best insure a genuine indication of the public sense. But if they were of less estimation, than they really are, the canvassers must expect the performance of them from a *sheriff*; since, in the peremptory language of the election law, they are bound by oath, faithfully, honestly, and impartially, to canvass and estimate the votes, contained in the boxes, delivered into the office of the secretary of the state by the *sheriffs* of the several counties.

If then the sheriffs be the legal agents, and those only, of whom the canvassers could, without perjury, take notice; the next enquiry is, whether R. R. Smith was sheriff of the county of Otsego, when he received and inclosed the ballots, that is, after the expiration of his year of office?

Every degree of official power must derive its existence ultimately or immediately from the people. To the constitution thereof and the laws of New-York, I appeal; referring, at the same time, to the common law and statutes of England, for such light as their authority or analogy may furnish.

The constitution declares, that sheriffs be *annually* appointed; and a constitution is the paramount standard, to which the ordinary legislature must conform. Hence no law of New-York, not even that of the 19th day of February, 1787, chapter 23, which has sheriffs for its object, attempts to specify the duration of office; but all the laws seem to rest it intirely on the constitution.

To be "*annually appointed*" implies, that an appointment is to last but one year. There is no other interpretation, of which these words are susceptible; unless it be, that the council of appointment shall, once in every year shew their pleasure, by appointing a person, without conferring on him any authority.

This construction cannot deserve a refutation. An appointment is an empty sound, if it does not operate on a vacancy in office; and therefore to clear the way for an annual appointment, the preceding appointment must annually cease. Nay, if the same person should be re-appointed for the second year, he holds under that re-appointment alone.

In *L. Strange*, page 625, is the case of *Foot, vs. Prowse*, which may be supposed unfriendly to my doctrine.

Foot, versus Prowse, mayor 'de Truro.

The mayor was chosen out of the aldermen, who are *annuati* in the legend; the fact on a trial at bar was, that the aldermen present at his election had been in several years, and had none of them been re-elected within a year. On a bill of exceptions the court was of opinion, that the election of the mayor was void for want of an annual election of the aldermen. But upon error in the exchequer chamber, and two solemn arguments, the judgment was reversed; and it was held that the words *annuati* in the legend were only directory, and that an annual election of them was not necessary to make an election in their presence good: And King, C. J. de C. B. who delivered the opinion of the court, compared it to the case of a constable, and other annual officers, who are good officers after the year is out, until another is elected and sworn. The reversal affirmed in parliament.

Why were the words, "*annually to be elected*," said to be only directory? not because their true meaning imposed no obligation of an annual election, but because the charter, requiring the election, suffered the old aldermen to continue, until others should be elected and sworn. The final decision was made in parliament, as may be seen in 3d Brown, 167.: Queen Elizabeth had, by charter, appointed Henry Rawe, and three others, the four first aldermen, to continue to the 9th of October following, and *until other burghesses should be elected and sworn*, according to the order and provision for electing a mayor. A mayor was also appointed until the 9th of October following, and *until another burghess should be elected and sworn mayor*; and forever after, yearly, on the 9th of October, a mayor was to be chosen, who, being sworn, should bear the office of mayor for one year, then next following, and *until another should be chosen in his place*. Although it would have been more satisfactory to inspect the charter at large, yet enough is disclosed in Brown's report to shew, that the seats of future aldermen stood upon the same ground with the original aldermen, namely, until successors should be elected and sworn. A similar extension of office is not to be found in the constitution of New-York, for it adds nothing to the command, that sheriffs shall be annually appointed. In truth it may well be

doubted, whether precedents, drawn from the power of a petty corporation, ought not to be received with caution, in a constitutional subject, as that of appointing sheriffs is, in defiance of strong & plain words: perhaps this might of itself be an adequate reason for passing over the comparison of Chief Justice King, who delivered the opinion of the court in *Strange*, and in general affirms, that annual officers are good officers after the year is out, until others are elected and sworn. But an answer may, with propriety, be postponed until we shall be informed, whether the reporter has not omitted some expressions of the judge, equivalent to those omitted in the recital of the charter, or at least, what are the precise words under which the annual officers alluded to are appointed?

In the mean time, it may be propounded to those who espouse the prolongation of office—What would be done, if it should happen, in some year, that, for one of the counties in New-York, members of assembly should not be returned? They are to be annually chosen, as sheriffs are annually appointed. Would the terms, "*annually to be chosen*," be associated with an implication, that the former members should continue, until the new were elected and sworn?

It has been suggested, as an adversary argument, that the provision, against the capacity of a person to hold the office of a sheriff more than four years successively, amounts to an allowance to hold until the expiration of four years; if no other appointment should be complete. The negative form of this passage, in the constitution, renders it impossible to be wrested into a positive conveyance of power. But if it were even to run, that "*every sheriff should be capable of holding that office for four years successively*," this would not continue him for four years under the old appointment, any more than, if he had been capable of being appointed during life, he might have remained during life under the old appointment. It is presumed, that something more must have been designed by the authors of the reasoning now combated. It must have been contemplated, that the office of sheriff is holden during the pleasure of the council of appointment, and, therefore, until that pleasure should be withdrawn, the officer might remain for four years. In the 28th section of the constitution it is ordained, That when the duration of any office should not be ascertained therein, it should be construed to be held during the pleasure of the council of appointment. Even those, who suppose the shrievalty to be an office of this description, must agree, that beyond four years the council of appointment themselves could not retain the same sheriff, and that their pleasure is necessarily confined to the displacing of him within that term. In like

manner, although the person appointed for the first year may be removed within the year, yet cannot he be continued in the same appointment over that year? But is the office of sheriff dependent on the pleasure of the council? Is not its duration ascertained, when an appointment is to be made every year? I refer to the foregoing observations, on the words, "*annually appointed*," in support of the opinion, that its duration is ascertained, and is, therefore, independent of the pleasure of the council.

I view, with respect, three objections, which may be advanced against that comment on the two sections of the constitution, which eventuates in the denial of the power of a sheriff to hold his office by virtue of the same appointment longer than one year. It may be argued,

1. That the right of suffrage is too sacred to be thwarted, without the most obvious necessity.

2. That, according to my sentiments, the counties may be often deprived of sheriffs.

3. And, That a governor may, upon these principles, prevent the taking of votes, which he suspects to be against him.

To every argument, founded on mere inconvenience, I oppose two general maxims, that the exercise of power, beyond the term assigned, accords not to the genius of republican government, and that no inconvenience can counter balance the danger of exceeding the authorities delegated by a constitution. I mean not, however, to insinuate, that those who think differently, possess a smaller degree of republican fervor than others. I resort to the characteristic of the government, solely as a source of construction.

But let us be more particular.

1. The very sacredness of the right of suffrage exacts a degree of rigor, in insisting upon those rules which are destined to be the outworks of its defence. In proportion to its magnitude, is it in the hazard of being abused, since the temptation is more violent. With this belief the legislature called upon the sheriff *officially* to be the fiduciary of the ballots. Through this pure channel, delineated by law, ought they, therefore, to come—Otherwise, subtilty and refinement may, by degrees, reduce this security against fraud to a mere nullity.

2. The second objection would have more weight, if a constitutional mode was not prescribed for the succession of sheriffs. By a timely appointment, and a timely qualification, the chasm will, most commonly, be supplied. The purpose, then, of continuing the old sheriff, must be, to remedy the negligence of the council, or of the new sheriff. In either of these respects, it is certainly better to rely on the incentive, which public duty, and

the dread of public punishment may afford to the council, and on the readinels with which men enter into the lucrative offices, than to strain the constitution. Can an instance be recollected in which one man is indulged in the exercise of a power upon no more plausible ground, than that two others will not do, what would supersede the necessity of such an exercise of power? Here indeed, the council had performed their part early enough, to wit, on the 13th of March 1792, by the appointment of Benjamin Gilbert. In the course of human affairs, there will be vacancies, in the office of sheriff, which lie open for some time without any temporary substitute being marked out by law.

3d. The third objection has in a great measure been answered under the second. It may be answered further. Unlimited confidence in public officers is not to be required; but a reasonable confidence is due to them. If the convention, which framed the constitution, or the legislature, which passed the election law, were governed by this consideration, it must be concluded, that they saw not sufficient grounds, for signifying their distrust, and therefore designedly omitted a provision against a possible delinquency. That jealousy did not prevail in the convention against the governor on this head, is manifest, because he is constituted a member of the council of appointment. That it did not prevail in the legislature is equally clear; because the sheriff, although to be created through him, is a minister in his election; and it would be a vast stride to attribute from a suspicion, recently entertained, and not presumed as yet to be verified in any manner, a meaning to words which it was not originally intended they should bear. Such a suspicion too becomes less warrantable, when we recur to the other characters, in the council, who must be somewhat accessory by their silence to any scheme of a governor, before it can have its effect.

To this brief examination of the above objections, I will subjoin a question to those, who advocate a supposed authority in R. R. Smith, as growing out of his past year of office, upon the idea, that the pleasure of the council was not revoked. Was he *compelled* by the constitution to execute it after the expiration of the year, until a successor shall be qualified, or might he choose? It probably will not be denied, that he might resign during the period, which is said to be attendant on his old year. His letter then of the 13th of January 1792, is a declaration that he will not continue after the year. No form is fixed for resignations. His conduct explains his own judgment on that letter, for he assents to be elected into the incompatible office of supervisor. It was accepted by the council, as a resignation; because on the 20th of March 1792, they granted the commission to Benjamin Gilbert.

If therefore it were even to be admitted, that a personal right to an office, may, though once extinguished by a resignation, revive with the consent of the council, as if it had never been abandoned; yet cannot he return to the enjoyment without their approbation: and this appears not to have been given.

This is the only stress, which I shall lay upon R. R. Smith's election into the supervisorship. For I own that the constitutional prohibition to a sheriff to hold any other office seems rather to vacate that office, than to affect the shrievalty. In saying this every attention is paid to the case of Milward vs. Thacher; in 2d term reports 81, & without impeaching the law, sustained there, I think that the expression in the constitution excludes the general doctrine of the law, by which the latter incompatible office would vacate a former one.

When we pass on to the statutes of England, several occur which attract our notice. It is acknowledged that the 14. Ed. 3. ff. 1. ch. 7. 28. Ed. 3. ch. 7. 42. Ed. 3. ch. 9. 46. Ed. and 23. Hen. 6. ch. 7. forbid a sheriff to tarry or abide in office, above one year; and yet it hath been said, that a sheriff may be appointed during the king's pleasure, 1. Black. com. 342.

These statutes, and consequently the decisions upon them, never carried any intrinsic authority to controul the constitution; as may be seen in the 25th section of that instrument. Nor did the statutes themselves exist after the first day of May 1788. Vide the law of the 27th of February 1788.

They can be used, therefore, only as illustrations; but injure not my positions. Abstractedly from the opinions of judges, few would hesitate to pronounce, that no king of England could legally grant a commission, which should go over the year. Blackstone himself, though unwilling to declare this explicitly, presents a contrary opinion to the public eye; not as his own, but in that doubtful phraseology, which betrays his disapprobation, "It is said." Nay more, He quotes Milton's case in 4. Rep. 32. as the basis of this saying. This determination was preceded by another in the year book of 2. Hen. 7. 6. which was built upon the dispensing power of the crown. 2. Hawk. P.C.C. 37. sec. 29. The dispensing power was recognized at the time of Milton's adjudication; and under such auspices, no statute could thwart the royal pleasure. In what part of the constitution of New-York is this tremendous attribute to be discovered? In none.

The very recurrence to the prerogative, as the reason for a sheriff holding over, announces, that the limitation of one year, would otherwise have been accepted, as the natural interpretation of the statutes.

To the same effect, might the 28. Hen. 6. ch. 3. and 8. Ed. 4. ch. 4. be cited, by which pardons are granted to sheriffs for continuing in office more than one year, in defiance of the 14. Ed. 3. ch. 7. which was an offence not pardonable by the king. To the same effect, might be cited the 9. Hen. 5. ch. 5. and 12. Ed. 4. ch. 1. permitting the king to keep sheriffs in office for four years, against the injunctions of 1. Ric. 2. ch. 11. and 1. Hen. 5. ch. 4. and also the 17. Ed. 4. ch. 7. empowering sheriffs, after their year, to execute certain process.

But after all, the concession of the dispensing prerogative would only enable the king to set the statutes aside; and a commission like that, granted by the council of appointment, could never imply an intention in the king, that the office should surpass the year.

The common law supplies another turn of argument, by confirming various acts of officers *de facto*—and R. R. Smith is represented to be in that predicament. There are, it is true, many examples of this kind, and among them is that of a sheriff *de facto*. To enumerate them all, or to draw the limit within which a sheriff *de facto* will be tolerated, is a task which need not be now undertaken. Suffice it to observe, that it is not every man who should pretend to be sheriff, that would be admitted as such. The British books themselves would discard the claims of him who may have resigned, or may have been discharged. What resignation could be more decisive of R. R. Smith's wishes, than his letter? Was it not complete, when the council proceeded to another appointment? What writ of discharge can be more powerful, than a commission which has expired, as all, who peruse it, will confess, and a constitution, which would have been violated, had that commission exceeded the space of one year? In New-York, a regular writ of discharge, according to the register, or any other form, is unknown—In England, the office is commensurate with the royal will. Hence the former must have its peculiar mode of terminating the office, and is not assisted, in this circumstance, by the analogy of the latter. It would be unusual too, even upon the *de facto* doctrine, to suffer R. R. Smith, who had not exercised the office from the 18th of February to the 1st of May, to re-exist, after this interruption, for the performance of a single act.

It has been suggested by some able men, that it was not within the province of the canvassers, to investigate the title, by which R. R. Smith claimed his office.

The introduction of sheriffs into this business was in contemplation of their office; and no private individual appears to have been deemed by the legislature, worthy to be intrusted with it.

Whether the box passed through the hands of the sheriff, is, therefore, a material enquiry to be instituted somewhere. Not more than three descriptions of persons can be presumed to be connected with it; the inspectors, the secretary of state, or the canvassers. Among the functions of the inspectors, only one has the most distant affinity to this branch of the subject, namely, the delivery of the inclosure to the sheriff of the county. For themselves, indeed they are to judge who is sheriff; but the law does not bestow on them the privilege of forcing a man, as sheriff, upon the canvassers; who are not subordinate to the inspectors, and are equally bound by oath, for upright behavior. The secretary of the state is still more remote from the right of dictating to the canvassers. The boxes are to be delivered into his office, where they are to be kept by him, for the canvassers. He stands between the inspectors and canvassers, as the depositary, and has no other relation to them. What might the clamor be, and how often just, if he could admit or reject boxes at his pleasure, and without the negative of the canvassers? He would be the maker of governors. But so far is the secretary from arrogating an undue authority, that he, by his report, brings the question directly before the canvassers. To them, therefore, it belongs; their office involves discretion; and being appointed by the legislature, they are the security of the representative body; that a governor shall not be illegally chosen,

But if R. R. Smith had been sheriff, ought the bundle of votes, which accompanied, but was not enclosed in, the box, to have been canvassed? If it was not prepared by the inspectors, the exclusion of it was inevitable for this cause, as they ought to have first put their seals and written their names on the enclosure. Admit, then, that it was prepared by the inspectors.

The committee are to open the boxes, and the enclosures *therein contained*, and to estimate the votes therein contained.—Would it not exceed their commission, to estimate votes *not therein contained*? Until the preliminaries against fraud, which the law has exacted, shall be complied with, the votes are not in that condition in which the law intended them to be, before they were counted. Under this impression, the box becomes more momentous. The sheriff is to put the enclosures into *one* box, upon receiving them—that is, as soon as he receives them; and thus is he cut off from that opportunity of practising unfairly on the enclosures, which delay and two boxes might produce.

What is to be the fate of the bundle of votes in the box? Those not inclosed were rejected, because they were not authenticated according to law, and, being destitute of authenticity, they are as if they had never been given. The vote of one man is neither bet-

ter nor worse for its conjunction with the vote of another. If it be urged, that as the votes, not in the box, might have changed the election in favor of the gentleman who is not certified to be governor, the votes well-retained ought to be thrown away;—upon a parity of reason, the votes of the rest of the counties ought to be thrown away. For in a general election in a state, the suffrages of one county have as intimate an union with those of the others, as in a county election the suffrages of one part of a county have with those of another.

Had R. R. Smith, been a qualified sheriff, he might have nominated a special deputy for the delivery of the boxes containing the ballots; for this is a ministerial act, and the law of New-York demanded nothing exclusively personal from the sheriff—See Dalt. 3. 514. Hob. 13. 7. Co. Rep. 11, Cro. Eliz. 294. Levett vs. Ferrar.

II. THE COUNTY OF TIOGA.

For the reasons before assigned under the head of Otsego, Hovey, the special deputy of the sheriff of Tioga, might have delivered the box into the secretary's office. Although H. Thompson be Hovey's clerk, yet is he an absolute stranger to the sheriff himself. It is a safe general assertion, that delegated powers cannot be delegated over, by virtue of the mere delegation in the first instance. And though a sheriff, to whom a writ is directed, may empower another to execute it, that person must personally execute it. Dalt. Sh. 117. The accident of Hovey's indisposition, on his journey to the office, does not vary the consequence. There certainly can be no room for suspecting, that it was feigned. But if sickness on one scale be an excuse, so it may on another; so may other excuses, equally powerful; until the assurance, afforded by the character of a sheriff, shall, by piecemeal, be annihilated. Could the committee of canvassers believe, that the clerk of a special deputy of a sheriff, was the sheriff himself, in the sense of the law?

III. THE COUNTY OF CLINTON.

Where a sheriff is at liberty to depute, he may express his will by writing or parol—See Cro. Eliz. 67. Clecock vs. Dennis. The person, then, who received the box of Clinton county, was qualified to deliver it into the secretary's office, if he was really deputed. Whether he was so or not, was a matter of evidence, resting with the committee. If the evidence produced was no more than the affidavit of the party claiming the power, it would go very far to suffer that, of itself, to preponderate.

UPON THE WHOLE, MY OPINION IS,

1. That R. R. Smith was incapable of receiving, and of being the bearer, of the votes given in the county of Otsego.
2. That, had he been the legal sheriff, the votes in the box of Otsego might have been canvassed; but even then, those in the bundle could not.
3. That the box from Tioga could not be canvassed.
4. That the propriety of canvassing the votes from Clinton depended on the judgment of the committee, whether the parol deputation was satisfactorily proved.

And, 5. That, under the election law, all questions, which arise upon any canvass or estimate, or upon any of the proceedings therein, shall be determined according to the opinion of the major part of the committee met; and their judgment shall, in all cases, be binding and conclusive.

EDM. RANDOLPH.

Philadelphia, October 6, 1792.

THE subjoined opinions have been received since the foregoing papers were sent to the press. They are printed to shew, that the decision of the canvassers is approved by lawyers who have carefully examined the question, and who, living in another state, cannot be suspected of being infected with the party prejudices of this.

OPINIONS OF OTHER LAWYERS.

WE have seen the statement of the case, respecting the votes of Otsego county. It is clear, beyond all doubt, that Mr. Smith was not sheriff of that county at the time of receiving and returning the votes. His appointment, for a limited time, was pursuant to law. When the time, for which he was appointed, commissioned and qualified, had expired, he could no more be considered as sheriff, than he could have been had he never been appointed. By virtue of the appointment, he obtained a certain authority for a certain time. To say, that by any implication whatever, that he was capable to do any act by virtue of that appointment, after the time for which he was appointed, had expired, involves the same absurdity, as to say, that a man may exercise an office without any appointment whatever.

The constitution has established the right of the people to elect the governor, but has left the mode to be prescribed by the legislature. When the legislature have prescribed the mode, the people must conform to it; and to say, that a mode may be adopted by the people, different from that which has been pointed out by the legislature, in any instance, is investing the people with the power of repealing the acts of the legislature. The

legislature ought to prescribe the most convenient mode of election, and unquestionably it would be proper, that in case of the vacancy of the office of sheriff, some other person should have power to return the votes ; but to say, that because the office of sheriff was vacant, that therefore the people were not bound to conform to the law in returning their votes, is to deny that the legislature have that power in regulating the mode of election, which they necessarily derive from the constitution.

ZEPHANIAH SWIFT.

MOSES CLEVELAND.

WE, the under written, have severally considered the question ; Was Richard R. Smith, sheriff of the county of Otsego on the third day of May A.D. 1792 ? And are clearly of opinion, that he was not, *de jure* or *de facto* sheriff of that county on that day.

New-Haven, October 27, 1792.

ASHER MILLER,

DAVID DAGGETT,

NATHANIEL SMITH,

DUDLEY BALDWIN.

IT has been frequently said, and even in print, that Mr. Lewis, of Philadelphia, has given a written opinion in favor of the principles adopted by the protesting canvassers. To prevent, therefore, the charge of partiality, it may be proper to remark, that the compiler of the above papers has never been able to obtain a sight of that opinion, or it would have appeared in this collection. If Mr. Lewis really gave an opinion to that purpose, why has it been thus cautiously concealed, when those of several gentlemen, so much his inferiors in professional reputation, were most industriously circulated ? Is it credible that so powerful an engine would have been left unemployed, at a time when every effort was made to confirm the prejudices and inflame the passions of the disappointed party ?

CERTIFICATE OF MESSRS. PYE AND VAN CORTLANDT.

IT having been insinuated in some late publications, that his Excellency Governor Clinton had occasioned an undue procrastination of an appointment of a sheriff for the county of Otsego: WE, the subscribers, members of the council of appointment, conceive it our duty, as an act of justice, to declare, that his Excellency the Governor, at the first meeting of the council, after our appointments, which was held on the fourth day of February last, notified the said council, that the times, for which the sheriffs of the counties of Queens, Richmond, Clinton, and Suffolk were appointed, were nearly expiring, and suggested the necessity of immediately making new appointments for those counties, which was accordingly done—That, at the same meeting, his Excellency the Governor produced to the council a letter from Richard R. Smith, then sheriff of Otsego county, wherein he declined a re-appointment to that office, and recommended a certain Mr. Wade to succeed him—That his Excellency also, at the same time, directed the clerk of the council to prepare, and lay before the said council, at their next meeting, a list of the officers annually appointed, and the times when their commissions actually expired; and also delivered to the council the different applications for the offices of sheriff, and their recommendations accompanying the same. That, at the next meeting of the said council, which was on the 21st day of February last, sheriffs for all the remaining counties in the state, except for the county of Otsego, and those which are to be made conformably to charters, were appointed, and that the only reason, why a sheriff of the county of Otsego was not, at that time, appointed, and the appointment suspended until the day it was made, was owing to a diversity of sentiment in the council as to the person to be appointed, which induced them to postpone the said appointment, in order that they might have an opportunity of obtaining farther information on the subject, and that Mr. Van Rensselaer joined with the subscribers in expressing his desire, that this delay might take place, and assigned, at the time, his reasons for so doing. And the subscribers further declare, that they never discovered any disposition in his Excellency the Governor, either at the above or any future meetings of the council, to defer that or any other appointment beyond the time in which they ought to have been made; but, on the contrary, he ever ap-

peared to us to be anxious to have the different appointments made in due season.

And the subscribers do further declare, That, except at the first and last meetings of the said council, three members, to wit, the subscribers and Mr. Van Rensselaer, only attended.

Given under our hands, the twenty-eighth day of September, 1799:

DAVID PYE,
P. V. CORTLANDT,

20 JY 64